

**U.S. Department of Labor**

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**Issue Date: 14 July 2004**

Case No.: 2003-LHC-02004

OWCP No.: 01-141968

In the Matter of

SHIRLEY A. BEAUDOIN  
Claimant

v.

ELECTRIC BOAT CORPORATION  
Employer

Appearances: Carolyn P. Kelly, Esquire      James Hornstein, Esquire  
For Claimant      For Employer

Before: Janice K. Bullard  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"), and the regulations promulgated thereunder. A hearing was held before me in New London, Connecticut on December 4, 2003. Claimant submitted a brief on April 12, 2004. Employer submitted a brief on April 19, 2004.

**I. STIPULATIONS AND CONTENTIONS OF THE PARTIES**

The parties entered into the following stipulations. (Tr. 6., Pre-hearing statements, and filings of the parties.)<sup>1</sup>

1. The parties are subject to the Act.
2. The injury occurred on June 7, 1996.

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<sup>1</sup> The following abbreviations are used. "JX" refers to Joint Exhibits; "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; and "Tr." refers to the transcript of the December 4, 2003 hearing.

3. The injury occurred at Employer's shipyard in Groton, CT.
4. The injury arose out of and in the course of Claimant's employment with Employer.
5. At the time of the injury, an employer-employee relationship existed between Employer and Claimant.
6. Employer was timely notified of the injury.
7. The claim for benefits was timely filed.
8. The notice of conversion was timely filed.
9. An informal conference was conducted on April 23, 2003.
10. Claimant's average weekly wage at the time of injury was \$754.71.
11. Claimant reached maximum medical improvement on September 7, 1996.
12. Temporary total disability payments for the period of April 2, 1997 through June 14, 2000 were paid at a weekly compensation rate of \$458.43.
13. Permanent partial disability payments for the period of June 15, 2000 to the present have been paid at a weekly compensation rate of \$265.90.
14. Claimant has suffered an injury.

The record reflects that Claimant experienced a series of unfortunate events that affected her right upper extremity. In June 1993, she was bitten by a tick at work, and the bite developed into an abscess that required surgery. Tr. 15. After her surgery, Claimant experienced pain in her neck and right extremity. Id. She returned to work, and on June 7, 1996, a door fell on Claimant's right extremity, which she claimed exacerbated her previous condition. Id. Claimant alleges permanent total disability from April 2, 1997 to October 1, 2000. Id. At about that time, Claimant secured a position as a teacher's assistant, and worked in that job until early June, 2002. Id. During that period, October 1, 2000 until June 4, 2002, Claimant alleges permanent partial disability. Id. Claimant alleges permanent total disability from June 5, 2002 to the present and continuing. Id.

Employer contends that Claimant had a preexisting condition relating to her tick bite and subsequent surgery. Id. at 16. Employer argues that Claimant is capable of working, evidenced by her own work history following her injuries, and therefore, she is not a candidate for permanent total disability benefits.

## II. ISSUES

The issues remaining to be resolved are:

Whether Claimant is permanently partially disabled;

Whether Claimant is permanently totally disabled; and

Whether Employer is entitled to § 8(f) Special Fund Relief.

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant graduated from high school in 1976 and in 1998 attended a 12 month course for Medical Assisting at Huntingdon Institute. Tr. at 20. Claimant started working with Employer as a pipe fitter in 1979. Id. at 21. Her job involved manufacturing pipes from blueprints and installing them on submarines. Id. at 22. Although most of Claimant's work was performed out in the open (Id. at 23), she had to go onto the submarines, and used ladders to enter and exit the ships. Id. at 22. Claimant stated that she carried tool bags and small pipe pieces when she went onto the submarines. Id. Claimant also worked as a union steward and a stowage person. Id. at 23. As a stowage person, she worked in tight spaces, and lifted items overhead, including small hoses and larger machinery. Id. at 24. Claimant also loaded heavier materials into overhead cabinets. Id. at 24-25. Claimant began working in stowage in 1989 or 1990 and continued until she left Employer. Id. When Claimant worked as a pipe fitter she used grinding tools, burs, deburrers, pipe cutters, bevel machines and pipe benders. Id. at 26. Claimant stated that all the pipe grinding and deburring machines were vibratory tools. Id.

Claimant considered her job "cushy" because everyone knew that she was injured and helped her so that she could avoid doing heavy work. Id. at 27. Claimant was bitten by a tick on her neck while she was cleaning up after a fire in the shop in June 1993. Id. Two hours after the bite, a nodule developed on Claimant's neck. Id. Claimant sought medical attention at the North Stonington Walk-in Center and was told that she had a sinus problem. Id. at 31. Claimant then went to the Employer's yard hospital which referred her to another facility. Id. at 31-32. Claimant had surgery on the nodule and when she awoke after the procedure, she experienced extreme pain in her shoulder. Id. at 32. Claimant returned to work six weeks later, but continued to experience severe pain in her shoulder. Id. at 33. Claimant continued to work despite the injury and received help from her co-workers because of her injury. Id. at 34.

On June 7, 1996 Claimant injured her arm with the door of a chest in the canteen. Id. Claimant saw several doctors for her arm injury, but they all found nothing wrong. Id. at 36. At the time of the injury, Claimant was taking Neurontin and Vicodin because of spasms she experienced in her arm. Id. After returning to work after the June 7 incident Claimant stated that she did "as much of the little things as I could" but received help from co-workers. Id. at 38. Claimant left work in April, 1997, because she could no longer perform her duties and was unable to get the same level of help from co-workers because of lay-offs. Id. at 39. Claimant then entered a medical assistant training program at the Huntington Institution, but said she that she could not perform the duties of a medical assistant because of her arm. Id. at 40. She said

that she could not do billing work because she could not use the typewriter due to her injury. Id. Claimant didn't look for a job when she finished the training program because she believed she could not perform the job duties. Id. at 44.

In October, 2000, Claimant worked for the North Stonington School System, as a teacher's assistant. Her job required her to watch students during class. Id. at 45. Claimant also assisted special education students with different activities. Id. Claimant stated that she was limited at her job because walking exacerbates her injury. Id. at 46. She worked 19 hours a week on average, earning approximately \$7.30 per hour until June 2001. Id. at 46-48. Claimant worked 2 to 4 hours each day during the summer and she returned as a full-time employee in the fall of 2001. Id. at 50. Claimant stated that she was unable to attend outings with students because of her injury. Id. Claimant stopped working with the school because her injury prevented her from participating in certain activities and performing a full range of duties. Id. at 52. Claimant has not worked since leaving her school job. Id.

Claimant asserted that when she does not rest her arm on pillows, she feels pain and numbness throughout her neck, shoulder and fingers. Id. at 44. She said that she is in constant pain, which medication only partially alleviates. Id. at 44. Claimant testified that she used to treat with Dr. Hargus every six months, but recently had gone to his office every three months. Id. at 51. Claimant believed she could not do the job of a cashier because of difficulties with her hand. Id. She can only perform one task at a time and then has to rest because her hand gets numb. Id. at 52-53. She said that she used an exercise machine, but was unable to exercise her right arm. Id. at 53. She no longer can play solitaire on her computer because her hand goes numb. Id. at 54. Claimant maintained that her doctor recommended that she stop working, and she said that she was not laid off before he advised her to stop working. Id. at 57.

## **Medical Evidence**

### June 21, 1994 Medical Evaluation of Dr. Edward P. Hargus (CX 3)

Claimant sought treatment from Dr. Hargus for pain in her shoulder after her surgery to remove the abscess on her neck. The report characterized the pain as "deep, burning and sharp." Dr. Hargus observed that Claimant's shoulder pain caused sleeping difficulties and also prevented her from holding onto objects. The report indicated that an August 1993 bone scan revealed bilateral carpal tunnel syndrome. The physician recommended that a "trial of stellate ganglion blocks" is appropriate. The physician also recommended pain medications.

### Operative Notes of Dr. Hargus from Lawrence & Memorial Hospital (CX 4)

The notes, dated July 5, 1994, document Claimant's right stellar ganglion block treatments. The notes stated that "[t]here was a definite decrease in pain, particularly about the face, shoulder and neck areas."

#### Lawrence & Memorial Hospital Pain Management Clinic Notes (CX 5)

The notes cover the period of January 30, 1995 through December 30, 1997, and document her use of two to three Vicodin per day. Decrease in muscle mass in the right arm is also recorded. Notes from July 8, 1998 observe that Claimant is severely limited in the range of motion of her right arm. Dr. Hargus opined the injury was an exacerbation of her previous neuralgic pain. The physician recommended that the Claimant take Neurontin. Notes from September 15, 1997 indicate worsening of Claimant's pain and "autonomic instability of that extremity." Claimant was advised to take four Vicodin per day. In a December 30, 1997, Dr. Hargus stated that Claimant's "current medical condition is reflex sympathetic dystrophy. I believe that she had a serious exacerbation of this problem related to her injury at work on June 7, 1996."

#### Lawrence & Memorial Pain Management Notes (CX 7)

The September 4, 1998 records noted an improvement in Claimant's pain. The report stated that Claimant "continues with marked accessory muscle dysfunction, some areas of decreased sensation particularly about the neck and medial scapula and suprascapular area."

#### Lawrence & Memorial Hospital (CX 10)

The note is dated April 30, 1999. Dr. Hargus refutes Dr. Leffert's findings:

I would disagree with Dr. Leffert. Ms. Beaudoin is clear that elevated [sic] her right arm relieves a very small part of her pain. She is clear that the pain involves her shoulder and arm in addition. It is clear that she has autonomic changes. It is clear that she has hyperpathia and allodynia. This confirms the diagnosis of RSD of her right upper extremity. She has documented nerve injury to the spinal accessory nerve. This nerve is not supposed to have sensory function. I believe Dr. Leffert should review the standard diagnosis of RSD in the literature.

#### Letter from Dr. Hargus (CX 12)

In a June 25, 1999 letter, Dr. Hargus refuted the opinion of Dr. Leffert that surgery may be beneficial:

I must say however that AMA guidelines are insufficient for a severe pain state such as that encountered by Mr. Beaudoin. I do believe that she she [sic] sympathetic dystrophy Type I or II of her right upper extremity. I believe that Dr. Leffert is in error. I believe that surgery will not be beneficial to her and will worsen her pain state. I stand by my last notes regarding her.

Lawrence and Memorial Hospital Pain Management Clinic Notes (CX 13)

The notes are from the period of December 13, 1999 through November 9, 2001. On December 19, 1999, it is observed that Claimant “does fairly well if she keeps within reasonable limits and does not use the extremity, in particular, does not reach for objects above her shoulder. CX 13 at 1. In a June 15, 2000 letter, Dr. Hargus disagreed with Dr. Willetts’ proposal for a brace, stating that it most likely would not be helpful. Id. at 2. A November 9, 2001 letter indicated that Dr. Hargus had left the facility and it was advisable that Claimant maintain her current dosage of OxyContin. Id. at 6.

W.W. Bachus Hospital Pain Management Clinic Notes (CX 14)

The records cover the period of June 24, 2002 through March 12, 2003. Records from June 24, 2002 indicate diminished hand grasp and drooping of the right shoulder. CX 14 at 1. Records from September 16, 2002 state that Claimant’s pain levels are still high and are activity related. Id. at 2. Records from November 11, 2002 state that Claimant is “doing rather poorly. Her pain levels are up to 10.” The records, written by Dr. Hargus state:

I certainly do not believe she is able to carry on any useful work function. Her pain levels are high. The disability to her arm is quite significant. Things like ironing cause her arm to go numb. She has not [sic] stop frequently, restart, stop and restart. She has no ability to really flex or abduct that extremity. She tends to stand on a stool to do the dishes. She has to keep the ironing board way down so that her arm is not raised. Thus, I do not believe she can work at all.

CX 14 at 3.

Records from December 17, 2002 state that Claimant’s “sleep is disturbed as are her activities of daily living, work routine, relationships and appetite, related to pain.” Id. at 5. On January 14, 2003, Claimant had a new complaint of bilateral knee pain. Id. at 8.

W.W. Backus Hospital Pain Management Clinic Notes (CX 18)

Notes from Dr. Hargus states in pertinent part that:

This is a difficult situation. Certainly RSD can spread. It can involve other extremities. It can go from arm to leg, from one side of the body to the other. This is always a difficult illness. I have no good explanation for her knee problems other than possibly a link to RSD, but certainly this is atypical.

Deposition of Dr. Edward P. Hargus (CX 22)

The deposition was conducted on November 19, 2003. The physician stated that he is board certified in pediatrics, pediatric cardiology, anesthesia, pain management and critical

medicine. CX 22 at 4. The physician has been practicing in pain management since 1987. Id. at 5. Dr. Hargus is also on the Examination Council of the American Board of Pain Medicine. Id. at 7. Dr. Hargus first saw Claimant on June 24, 1994. Id. at 8. At that time, Claimant complained of intense shoulder pain, originating from an infected tick bite that required surgery. Id. Dr. Hargus observed that the Claimant had a shoulder droop, which he said is the result of nerve damage. Id. at 8-9. The physician also noted extreme pain and muscle loss in the same area. Id. at 9. Claimant's pain was in her right arm, shoulder and neck area. Id. Dr. Hargus suspected that Claimant suffered some form of nerve injury, likely sympathetic dystrophy. Id. The physician prescribed ganglion blocks, which are nerve blocks used to alleviate pain. Id. at 10. Seven months after he performed the last block, Claimant returned with pain. Id. at 11.

Claimant visited Dr. Hargus again on July 8, 1996 complaining that she reinjured her shoulder area in an accident with a metal door. Id. Physical examination indicated "right shoulder droop, winging of the scapula, where the scapula flips outward when normally it's supposed to stay inside." Id. at 12. The physician also noted increased pain with light stimulation as well as decreased range of motion in the Claimant's right shoulder from 90 degrees to about 30 degrees. Id. at 13. The physician had previously prescribed Vicodin, and added Neurontin. Id. Claimant saw Dr. Hargus again in September 1997 and the doctor newly observed autonomic instability in her right extremity. Id. at 14. The physician stated that autonomic instability can be part of the syndrome of reflex sympathetic dystrophy. He believed that Claimant's incident with the door worsened her injury. Id. Claimant visited Dr. Hargus again in April 1998. Id. at 16. Physical examination indicated shoulder drop, winging of the scapula and extreme pain. Id. Dr. Hargus increased the level of Neurotin. Id.

Dr. Hargus saw Claimant again on May 22, 1998. At that time, Claimant appeared more relaxed. Id. at 17. She was taking Elavil, Vicodin and Neurontin. Id. In September 1998, Claimant exhibited the same problems along with decreased hand grasp and decreased sensation under the arm. Id. Dr. Hargus referred Claimant to Dr. Leffert who recommended surgery. Id. at 18. Claimant and Dr. Hargus agreed not to proceed with surgery. Id. at 19. Dr. Hargus saw Claimant again in June 2002 and found similar conditions with significant pain. Id. at 21-22. The physician stated that Claimant's medication dosages have increased over time, and that as of November, 2002 Claimant could no longer work:

I think pain is a tremendously limiting problem with her. And I don't believe, you know, I don't believe she can function in the work environment on a consistent basis day in and day out or hour in and hour out without suffering severe pain and being not able to perform - - perform in any work environment.

Id. at 23.

Dr. Hargus stated that Claimant is physically incapable of working as a cashier. Id. at 23-24. The physician opined that Claimant's condition has worsened over time. Dr. Hargus stated that Claimant occasionally experiences sedation, a side effect of the OxyContin. Id. at 26. Dr. Hargus was unable to distinguish the symptoms and treatments relating to Claimant's June 1996 injury and her prior injury. Id. The physician stated that Claimant is taking Celexa, an

antidepressant; Zanaflex, a relaxing drug; and the pain medications OxyContin and Vicodin, which she takes three and four times a day respectively. Id. at 33. On cross examination, Dr. Hargus testified that “my experience is that tolerance is not a significant problem; that pain worsens, and that’s why you have to increase meds; that tolerance is vastly overblown as a cause of increasing pain medications.” Id. at 44. The physician opined that OxyContin is no more addictive than any other narcotic. Id. at 46.

#### Yard Hospital Reports (CX 1)

The records contain information regarding Claimant’s June 7, 1996 injury when the door of an ice chest fell on her right shoulder. Physician’s notes from June 27, 1996 found a history of chronic shoulder pain. Nurse’s notes from the same date found a contusion of the right shoulder and strain of the right side of the Claimant’s neck and back. Notes from subsequent visits suggest no restrictions on work or away days.

#### Medical Evaluation of Dr. Jeffery S. Goldblatt (CX 6)

The report is dated April 30, 1998. Dr. Goldblatt opined that Claimant had “right trapezius palsy which is contributed to her right upper extremity pain. I don’t feel she has an obvious reflex sympathetic dystrophy.” The physician opined:

I think her disability is partial and that she is capable of performing light duty with no activity of the right upper extremity. She can do some light grasping of the right hand but I don’t feel that it is a functional right arm. She has reached maximum medical improvement if she undergoes no surgery. At this time, since it is my impression that we don’t know if she is going to undergo surgery it is hard for me to put a permanent partial disability percent on the injury and therefore I will not do it until we have a definite decision as to whether she will go forward with surgery. If she decides not then I think it is reasonable to go forward with a permanent partial disability.

CX 6 at 2. The physician opined that Claimant’s injury was related to her employment with employer.

#### Medical Evaluation Report by Dr. Frank W. Maletz (CX 8)

The report is dated October 29, 1998. The physician found that Claimant has atrophy of the trapezius, and diagnosed chronic pain syndrome. CX 8 at 3. The physician found “virtual complete loss of use of the right upper extremity in terms of positioning her dominant hand in space.” CX 8 at 3. The physician addressed the difficulties associated with potential surgery:

To consider surgical reconstitution of her scapular stability or trapezial function without directly addressing her pain syndrome, seems to me fraught with a potential for severe and devastating consequences, i.e.,



increasing her pain therefore resulting in more dysfunction. Any surgery, or any treatment for that matter, should be related to pain reduction.

CX 8 at 4.

The physician opined that Claimant has not reached maximum medical improvement. Id. The physician stated that Claimant could be helped by “nerve mapping with special attention to the upper brachial plexus[.]” Id. The physician recommended that Claimant consult with an expert in scapula reconstruction and shoulder and brachial plexus.

#### Medical Evaluation of Dr. Robert D. Leffert (CX 9)

The report is dated March 17, 1999. The physician opined that the Claimant “has a complete spinal accessory nerve palsy which appears to be connected with her incision and drainage for an abscess produced by a tick bite while at work in 1994.” CX 9 at 2. The physician disagreed with the diagnosis of reflex sympathetic dystrophy and diagnosed Claimant with “secondary thoracic outlet compression due to the droop of her scapula caused by the trapezius palsy.” Id. The physician recommended that an Eden-Lang procedure be performed. The physician also recommended a gunslinger splint or a pelvic support orthosis. Id. at 3.

#### Medical Opinion Report of Dr. Philo Willetts (EX 4)

The report is dated March 28, 2000. EX 4 at 1. A range of motion test showed restrictions in Claimant’s right shoulder. Id. at 4. The report found “much better passive than active voluntary right shoulder motion. There was no crepitus of the right shoulder. There was no instability.” Id. The report stated that Claimant may be partially disabled due to her June 7, 1996 injury. Id. at 6. Dr. Willetts concluded that her previous condition from her surgery after the tick bite was exacerbated by the injury she sustained on June 7, 1996. Id. The physician opined that Claimant is severely disabled with regards to her right extremity, but has full use of her left extremity. Id. However, the doctor did not consider Claimant to be totally disabled. Id. The physician placed the following work restrictions on the Claimant:

She should avoid climbing or descending ladders, cannot crawl, and should avoid lifting, pushing, or pulling with the right hand. She could sit, stand, walk, drive, climb and descend stairs, use her feet for foot pedal controls and use her uninjured left arm without restriction.

Id. at 7. The report states that Claimant reached maximum medical improvement on September 7, 1996. The physician addressed Claimant’s degree of impairment:

[Claimant] was left with a significant dysfunction of the right upper extremity long before June 7, 1996. This was chronic, ongoing, and was sufficiently severe to be treated with narcotics ever since 1993. This was the substantial contributor to her condition. Therefore, 20% permanent partial physical impairment of the right upper extremity preexisted June 7, 1996, and if her history be correct, the remaining 4% permanent partial

physical impairment of the right upper extremity could fairly be apportioned to the ice chest lid incident of June 7, 1996.

Id. at 8.

The physician opined that Claimant's previous condition, combined with the injury sustained on June 7, 1996 to produce substantially greater injury than would have been caused by the June 7, 1996 injury alone. Id. Dr. Willetts agreed with Dr. Leffert's recommendation that Claimant should attempt to use a brace to relieve her pain. Id. at 9. The physician also recommended that Claimant be weaned off of her pain medications. Id.

Medical Opinion Report of Dr. Phil Willetts (CX 2)

The report is dated April 24, 2003 and is based on a physical examination performed by the physician. CX 2 at 1. Dr. Willetts noted the pain that Claimant experienced in her shoulder following her surgery to remove an abscess from her neck, and the June 7, 1996, incident where she was struck by an ice chest door. Id. Claimant's treatment by Dr. Hargus is documented, including her prescribed medications for pain management, OxyContin, Vicodin, Celexa, Valium and Zanaflex. Dr. Willetts noted that the Claimant reported "increased pain primarily with elevation and motion of her right shoulder girdle as well as right neck rotation." Id. A review of the Claimant's social history contained the following:

She said that currently she did housework two hours per day, yard work one half hour per day, shopped and ran errands one hour per day, exercised on her Nordic Track fifteen minutes per day, watched television four hours per day, read eight hours per day. She said she played Solitaire on her computer for twenty to thirty minutes at a time. She said she took care of children on weekends.

Id. at 3.

Dr. Willetts observed that Claimant "walked holding her right wrist with her left hand and holding her right arm against the chest." Id at 4. The physician performed range of motion tests on Claimant's neck and shoulder. Id. Dr. Willetts reviewed several reports by Dr. Hargus, and the doctor concluded that Claimant's primary condition was her abscess in the neck area. Id. at 6. Since that surgery, Claimant has experienced "significant shoulder girdle and later neck and upper arm pains and dysfunction[.]" The report states that currently Claimant has "evidence of some mild right superior shoulder girdle atrophy, hypersensitivity in the supraclavicular and shoulder girdle area, some decreased reported sensation, and limited motion of her right shoulder with complaints of pain upon doing so." Id. at 6. The physician recommended continued drug treatment as well as an inexpensive home cervical traction kit which he thought might provide some relief. Id. The physician did not recommend additional surgery. Id. at 7.

Dr. Willetts opined that follow up with Dr. Hargus for pain medication adjustment would be reasonable and appropriate. Id. In the doctor's opinion, Claimant reached maximum medical improvement on September 7, 1996. Id. The physician opined that Claimant could return to her

“previous very sedentary job” with Employer (union steward), but could not perform the duties of a pipe fitter.” Id. The physician stated that the Claimant could do a variety of sedentary work with the following restrictions: avoid using her right hand above the shoulder, climbing ladders, crawling, pushing, pulling, and lifting with the right hand. Id. The physician stated that Claimant could use her left upper extremity without restriction and could also sit, stand, drive and climb and descend stairs. Id. Dr. Willetts concluded that “the 1994 injury, when combined with the June 7, 1996 chest lid injury, did produce significantly and substantially greater injury than what would have been caused by any June 7, 1996 work incident alone.” Id. at 8.

#### Medical Opinion Report by Dr. Philo Willetts (EX 5)

The report is dated September 26, 2003. The physician addressed the side effects of the various medications Claimant is taking. The list of side effects included confusion, sedation, addiction, respiratory difficulties, gastrointestinal problems, weight gain, drowsiness, apathy, dizziness, and anxiety. The physician stated that a “substantial portion of all of the medications prescribed by Dr. Hargus is the direct result of the preexisting and very substantial chronic neurological pain which [Claimant] suffered as a result of a tick bite and her subsequent surgery to relieve an abscess.” EX 5 at 2. The physician stated that at least 90 percent of Claimant’s pain, anti-anxiety, and anti-depression medications are the result of Claimant’s tick bite and related surgery. Id. at 3. The remaining 10 percent is attributable to her increased symptoms following the ice chest incident. Id. The physician opined that a reasonable dose of medication for treatment of Claimant’s June 7, 1996 injury would be one extra Vicodin per day. Id. The physician stated that the remaining medications used by the Claimant are related to her previous injury. The physician opined that Claimant would be able to do sedentary work. Id. at 4. The physician stated that Claimant could perform clerical, inspection and computer terminal work. Id. The physician also opined that Claimant should be weaned “from the significant amounts of narcotics provided to her[.]” Id.

#### Medical Report of Dr. Philo Willetts (CX 11)

The report is dated May 4, 1999. Physical examination revealed decreased range of motion in Claimant’s right shoulder as well as muscle weakness. CX 11 at 6. The physician opined that Claimant’s injury was predominantly preexisting. CX 11 at 10. Dr. Willetts concluded that the Claimant is substantially disabled, but could perform sedentary work with the following restrictions:

She should [] not use [] the right hand. She cannot climb or descend ladders. She cannot crawl. She could sit, stand, walk, occasionally drive, and could climb and descend stairs. She could use her feet for foot pedal controls and use her uninjured left arm without restriction.

CX 11 at 10. The physician stated that Claimant reached maximum medical improvement on September 7, 1996. The physician assessed Claimant’s impairment as follows:

It appears that the very substantial portion of her condition pre-existed the June 7, 1996, reported incident. Thus, of the 26% permanent partial

physical impairment of the right upper extremity, 20% permanent partial physical impairment very probably was long preexisting June 7, 1996, and, if the history reported June 27, 1996, of being struck by an ice chest door in the cafeteria be correct, then 6% permanent partial physical impairment of the right upper extremity could fairly be apportioned to that June 7, 1996 incident. A review of Dr. Hargus' findings prior to June 1996 might help with apportionment.

CX 11 at 11. Dr. Willetts further opined that Claimant's previous injury combined with the June 7, 1997 injury to create Claimant's current state. Id. at 12. The physician recommended that a shoulder elevation brace be tried, and if successful, a muscle transfer operation, as suggested by Dr. Leffert, may be beneficial. Id.

#### Deposition of Dr. Philo F. Willetts (EX 6)

At his deposition on October 29, 2003, Dr. Willetts stated that he is board certified in orthopedic surgery. EX 6 at 3. He examined Claimant three times and concluded that she sustained significant nerve damage after surgery for her tick bite related abscess. Id. at 4. Dr. Willetts stated that he last saw Claimant on April 2003, and she complained of right shoulder, neck and upper extremity pain. Id. at 5. The physician measured the circumference of both her arms in order to evaluate Claimant for muscle atrophy and he determined that there was no atrophy of the upper arm. Id. at 6. The physician found atrophy of the trapezius muscle and the supraspinatus muscle, which is on top of the shoulder blade. Id. at 7. The physician opined that Claimant could not perform the duties of a pipe fitter. Id. The physician opined that Claimant is partially disabled as a result of the June 7, 1996 incident, but "[t]here is no question that the vast majority of her disability long pre-existed June 7, 1996." Id. at 11. Dr. Willetts opined that the medication prescribed by Dr. Hargus is neither appropriate, nor reasonable to address any effects of Claimant's latter injury. Id. at 12. The physician continued:

It's a little difficult to find anything in the record that shows there is true physical increased disability of dysfunction following June 7, 1996. It all is based on her own representations of pain. I have no doubt that she has had significant amount of pain following her original condition and the surgery therefore with the nerve injuries, but for quite a while, months after June 7, 1996, there really wasn't much change in the provision of medications for her. She was taking an average of three or four Vicodin narcotics every day prior to June 7, 1996, and there wasn't much change thereafter. . . . She, herself, stated to me that she did not feel any improvement, despite the change in her medications.

Id. at 13.

In Dr. Willetts' opinion, patients should be tapered off narcotics to avoid them building a tolerance to the medications. Id. at 13. The physician stated that Claimant could perform sedentary work that does not involve much use of the right upper extremity. Id. at 14. The physician explained his opinion on Claimant's ability to work:

First, there is no impairment of the opposite left upper extremity. There is no impairment of her lower extremities. She was alert, despite the tolerance, presumably because of the tolerance she had built up her narcotics. She was able to think rationally and respond appropriately to verbal [sic], could communicate very satisfactorily. She had use of the hand muscles, and even though she would be limited in the shoulder's ability to put the hand in various positions, she could get some use out of her hand.

Id. at 14-15.

The physician also stated that his opinion was based in part on Claimant's own admission that she performed some housework, yard work and exercise every day. Id. The physician opined that for a finding of total disability, he would expect to find significant compromise of both an individual's upper and lower extremities. Id. at 16.

#### Office Notes of Dr. Andrew Halberg (CX 15)

The notes detail follow up visits regarding Claimant's knee problems. The physician stated that the pain "is a curious progression and it suggests to me the possibility of some sort of arthritic condition such as rheumatoid arthritis or Lyme or something along those lines."

#### Coastal Rheumatology Office Notes with Westerly Hospital Laboratory Results (CX 16, CX 17)

Records from April 7, 2003 indicate Claimant suffers from osteoarthritis and joint effusion of the knee. CX 16 at 2.

### **Vocational Evidence**

#### Concentra Managed Care Vocational Assessment (EX 3; EX 1)

Claimant was referred for a vocational assessment by Employer's insurer, which apparently was conducted by Kent S. Moshier, MS, CRC. A report annotated with his name is dated May 25, 2000 and relied upon the medical reports of Dr. Willets, and the restrictions that he imposed:

She should be at no use of the right hand. She cannot climb or descend ladders. She cannot crawl. She could sit, stand, walk, occasionally drive, and could climb and descend stairs. She could use her feet for foot pedal controls and use her uninjured arm without restriction.

The report also refers to medical reports of Drs. Hargus and Maletz, and an office note by Dr. Leffert. It was determined that Claimant could perform the jobs of hostess, cashier-checker, sales clerk (counter), reservations agent and cashier. The results of a labor market survey are listed, as follows:

### Hostess positions

Foxwoods Casino  
Mashantucket, CT  
\$7.00-\$8.10 per hour (\$6.00-\$7.00 in 1996)

Winnepaug Inn  
Westerly, RI  
\$6.75-\$7.25 per hour (\$6.00-6.75 in 1996)

Unk's-on-the-Bay Restaurant  
Waterford, CT  
\$7.00-\$7.25 per hour (\$6.50-\$6.75 in 1996)

Friendly's Restaurant  
Mystic, CT  
\$7.00-\$9.00 per hour (\$6.50-\$7.00 in 1996)

Hideaway Restaurant  
New London, CT  
\$6.50-\$7.50 per hour (\$6.00-6.50 in 1996)

### Cashier positions

Foxwoods Casino  
Mashantucket, CT  
\$7.00-\$8.10 per hour (\$6.00-\$7.00 in 1996)

Blockbuster Video  
Groton, CT  
\$6.50-\$7.00 per hour (\$5.50-\$6.25 in 1996)

Plaza Ford  
East Lyme, CT  
\$7.00 per hour (\$6.00 in 1996)

Eurest Support Services  
Groton, CT  
\$6.50-\$7.00 per hour

Quik-Eze Mobil  
Groton, CT  
\$7.25 per hour (\$5.50-\$6.00 in 1996)

### Sales/counter clerk positions

Grimes Cleaners  
Norwich, CT  
\$6.75-\$7.00 per hour (\$6.00-\$6.50 in 1996)

Barry's Cleaners  
New London, CT  
\$7.00-\$7.25 per hour (\$6.00-\$6.50 in 1996)

Reservations agent positions

Lighthouse Inn  
New London, CT  
\$7.00-\$7.50 per hour (\$6.50-\$7.00 in 1996)

Springhill Suites (Mariott)  
Waterford, CT  
\$6.75-\$7.50 per hour (\$6.75-\$7.50)

Spa of Norwhich Inn  
Norwich, CT  
\$7.00-\$8.00 per hour (\$6.00-\$6.75)

Comfort Suites of Norwich  
Norwich, CT  
\$7.00-\$8.00 per hour

Mystic Hilton  
Mystic, CT  
\$7.00-\$7.50 per hour (\$6.00-\$6.50)

Flagship Inn  
Groton, CT  
\$7.50 per hour (\$6.50)

Best Western Olympic Inn  
Groton, CT  
\$6.50-\$7.50 per hour (\$6.00-\$6.75)

Clarion Inn  
Groton, CT  
\$7.00-\$7.50 per hour (\$6.00-\$6.25 per hour)

Concentra Integrated Services conducted additional labor market research that is summarized in a report of August 15, 2003. Additional medical records of Drs. Willetts and Hargus were reviewed in conjunction with the preparation of this report, and it was concluded

that Claimant would be capable of performing sedentary duty jobs. The occupations of front desk clerk and cashier were identified as appropriate positions in consideration of Claimant's background, skills and physical limitations. The report was prepared by Elizabeth Sinatro, M.Ed., CRC.

The report listed four front desk clerk positions:

Hilltop Inn and Suites

North Stonington, CT

\$8.00-\$9.00 per hour. (\$6.00-\$7.00 in 1996)

Duties: answering phone, taking reservations, computer input, checking guests in/out

The report states that "[t]his is a sedentary position with no work above shoulder level, no ladders, no crawling, no pushing, and no pulling. Lifting is very minimal and can be done with left hand." The position is located in Claimant's home town, and the job duties are deemed to meet Claimant's physical capacity.

Best Western

Niantic, CT

\$8.00 per hour (\$6.00 in 1996)

Duties: phones, reservations, contact other departments within hotel, check guests in/out

The report states that "[t]his is a sedentary position with no overhead work, no ladders, no crawling, no pushing, and no pulling. Lifting does not exceed 5 pounds and can be done with left hand." The position is 23.9 miles from North Stonington, CT. The job duties are deemed to meet Claimant's physical capacity.

Budget Inn

North Stonington, CT

\$8.00-\$8.50 per hour (\$6.00-\$6.50 in 1996)

Duties: greeting guests, check in/out, providing information, phones, reservations, providing quotes and completing necessary paperwork

The report states that the job duties meet Claimant's physical capacity. The report states that "[t]his is a sedentary position with no overhead work, no ladders, no crawling, no pushing, and no pulling. Lifting does not exceed 5-10 pounds and can be done with left hand." The position is located in North Stonington, CT.

Foxwoods Casino

Ledyard, CT

\$10.00-\$11.00 per hour depending on experience (\$8.00 in 1996)

Duties: registering guests, assigning rooms, responding to guest inquiries

The report states that the job duties meet Claimant's physical capacity. The report states that "[t]his is a sedentary position with no overhead work, no ladders, no crawling, no pushing, and no pulling. Lifting does not exceed 10 pounds and can be done with left hand." The position is located 5 miles from North Stonington, CT.



The report also lists the following available cashier positions:

Wal-Mart

Groton, CT

\$8.00 per hour. (\$6.00 in 1996)

Duties: ringing up purchases, sliding purchases over scanner, completing cash and credit card transactions, providing change and receipt

The report states that the job duties meet Claimant's physical capacity. The report states that "[t]his is a sedentary position with no overhead work, no ladders, no crawling, no pushing, and no pulling. Lifting does not exceed 10 pounds and can be done with left hand. Heavier items are moved by customer or remain in cart and are hand scanned." The position is located 15.5 miles from North Stonington, CT.

Mohegan Sun Casino

Uncasville, CT

\$8.00-\$9.00 per hour. (\$6.00-\$7.00 in 1996)

Duties: responsible for ringing up customers, scanning items, placing purchases in bags, accepting payment and providing change and receipt.

The report states that the job duties meet Claimant's physical capacity. The report states that "[t]his is a sedentary position with no overhead work, no ladders, no crawling, no pushing, and no pulling. Lifting does not exceed 10 pounds and can be done with left hand." The position is located 14.6 miles from North Stonington, CT.

Foxwoods Casino

Ledyard, CT

\$8.00-\$9.00 (\$6.00-\$7.00 in 1996)

Duties: responsible for ringing up food orders within assigned area. Customers will bring tray of items forward for purchase and employee must ring them up, accepting payments and providing change.

The report states that the job duties meet Claimant's physical capacity. The report states that "[t]here is no overhead work, no ladders, no crawling, no pushing, and no pulling. Lifting does not exceed 10 pounds and can be done with left hand." The position is located 5 miles from North Stonington, CT.

CVS

Groton, CT

\$7.50 per hour. (\$5.50 in 1996)

Duties: responsible for completing customer transactions, scanning items and accepting payment, bagging items, providing correct change, must place returned items on store shelves.

Ms. Sinatro concluded that Claimant is able to perform certain occupations, and she wrote:

The above information is a sampling of the positions for which Ms. Beaudoin would qualify in her labor market based on transferable skills, education, and/or entry level position. Ms. Beaudoin's physical restrictions do not limit her from completing these positions based upon the Independent Medical Evaluation completed by Dr. Willetts on April 24, 2003 and the Dictionary of Occupational Titles. This information clearly demonstrates that there are vocational opportunities, which could return Ms. Beaudoin to gainful employment at wages ranging from \$300 to \$440.00 per week.

Deposition Transcript of Elizabeth Sinatro (EX 7)

Ms. Sinatro is employed by Concentra Integrated Services as a vocational case manager. EX 7 at 3. She holds a Master of Education degree and a Master of Rehabilitation Counseling degree. She is a certified rehabilitation counselor. Id. According to Ms. Sinatro, "due to the physical nature of the job and [Claimant's] current functional functioning,[] she was most likely going to be most appropriate for entry-level-type positions." Id. at 3. Ms. Sinatro reviewed the medical exams of Dr. Willetts and Dr. Hargus. Id. at 5. She stated that there was very little in Dr. Hargus' report regarding Claimant's physical capabilities. Id. at 7. Ms. Sinatro relied more on Dr. Willetts' report. Id. Relying on Dr. Willetts' report, Ms. Sinatro stated that Claimant could do a variety of sedentary work with restrictions on her right hand. Id. She also stated that Claimant could use her left hand without restriction. Ms. Sinatro found two occupations for Claimant: front desk clerk and cashier. Id. at 7. She found four available positions as a front desk clerk and four positions as a cashier. Id. Ms. Sinatro spoke with some of the potential employers and explained Claimant's physical limitations and the requirements of the job. The front desk jobs range in salary from \$320 to \$440 per week and the range for cashier jobs is \$300 to \$ 360 per week. Ms. Sinatro was also able to obtain wage information for 1996. Id. at 9.

On cross examination, Ms. Sinatro stated that Claimant could potentially perform the duties of a cashier without any use of her right arm. Id. at 11. Ms. Sinatro testified that in her analysis of Claimant's ability to work, she took into account the restrictions placed on Claimant by Dr. Willetts, but did not consider pain as a factor. Id. at 13. She stated that she was unaware of the numbness Claimant has said she experiences. Id.

Deposition of Cherie L. King and Vocational Assessment and Evaluation (CX 24)

Ms. King is a board certified vocational expert and rehabilitation counselor who performed a vocational assessment of the Claimant. CX 24 at 4-7. She holds a Master's degree in rehabilitation and is currently pursuing a doctorate. Id. at 8. Ms. King stated that Claimant has no transferable skills that could be used in other occupations. Id. at 11-12. Ms. King opined that Claimant could not perform the duties of a cashier or desk clerk: "given her functional limitations, both the exertional and nonexertional limitations that both Dr. Willetts and Dr. Hargus were talking about, [] I didn't think that those occupations and jobs that were identified in the labor market survey were appropriate for [Claimant]." Id. at 12. Ms. King defined exertional as "physical functioning" and nonexertional as "dealing with people, being able to

maintain persistence in pace, being able to make judgments and decisions.” Id. at 13. Ms. King opined that Claimant would be unable to maintain a part-time position for more than one or two weeks. Id. at 15.

On cross examination, Ms. King stated that she has had some success placing individuals with upper extremity restrictions in employment. Id. at 16. Ms. King agreed Claimant could likely be retrained in a field, since she has already demonstrated the capability to go through the academic requirements involved in retraining in her medical assistant program. Id. at 21. Ms. King also agreed that 45 years old is a rather young age to declare someone unemployable for the rest of her life. Id. at 21-22.

Ms. King’s vocational assessment was dated January 22, 2004. It states in pertinent part:

My overall vocational impression is [Claimant] is a 45-year-old skilled worker who has been out of work since 2001. In addition to the physical demands of her past work, she was also required to demonstrate non-exertional work requirements such as concentration, ability to multi-task, deal with and communicate professionally with co-workers, supervisors and children, ability to make decisions, ability to deal with changes in work environment quickly and effectively to regain focus. She was also required to problem solve, self initiate and maintain her workflow, speed and accuracy. Her ability to effectively attend to these demands of any work is severely impacted by pain according to her treating physician.

Based on the review of all the records, opinions of her treating physician, work capacity, lack of transferable work skills and the apparent non-exertional work impairments related to pain, it is my opinion that [Claimant] could not perform her past occupations. From a vocational standpoint, I do not believe she is able to meet the demands of any competitive work and not able to return to the work force based on her present level of functioning.

## **Other Evidence**

### Form LS-203 (CX 2)

The form is dated September 30, 1997 and states that Claimant was injured on June 7, 1996 by the door of an ice chest that fell on her right shoulder. The form also states that Claimant requests the employer to provide medical care.

### Claimant’s letter to Employer regarding benefits (CX 19)

Claimant states in the letter that she has been under the care of Dr. Hargus since 1996 for treatment of Reflex Sympathetic Dystrophy, but that Dr. Russ was her primary care physician. The letter states that Claimant understood she was going to be paid accident and sickness benefits from Employer and Aetna Insurance:

At the end of July, I received a call from Bob Restivo telling me that the case had been settled and I was getting paid. About a week and a half later I again called my union rep. to try and figure out when I should expect to receive a check and when he called the insurance office he was told I had been denied. Three days later I received written notification of denial from Aetna. Please consider this letter a request for appeal.

#### Employer's Master Personnel Record (CX 20)

The records cover a period from February 15, 1981 to April 18, 1997. The records indicate that Claimant worked as a pipe fitter during this period.

#### Employer Wage Records (CX 23)

The records prepared on October 7, 1997 detail Claimant's hours, pay and benefits.

#### A. Discussion

##### 15. Prima facie case under the Act, and the § 20(a) presumption.

Coverage under the Act is presumed in accordance with § 20(a) in the absence of substantial evidence to the contrary. Claimant bears the burden of establishing entitlement to the § 20(a) presumption by establishing a prima facie case. To establish the presumption, Claimant need only show that she (1) suffered an injury, harm, or pain and (2) working conditions existed which could have caused the harm. U.S. Industries/Federal See, Metal v. Director, OWCP, 455 U.S. 608 (1982). In order to establish a prima facie case of total disability, the Claimant must show that she cannot return to her regular or usual employment due to her work-related injury. At this initial stage, the Claimant need not establish that she cannot return to any employment, only that she cannot return to her former employment. Elliot v. C & P Tel. Co. 16 BRBS 89 (1984).

An employer may refute the presumption by establishing the lack of a causal nexus. Dower v. General Dynamics Corp., 14 B.R.B.S. 324 (1981). If the § 20(a) presumption is successfully rebutted, it falls out of the case and all of the evidence must be weighed to resolve the causation issue. Hislop v. Marine Terminals Corp., 14 B.R.B.S. 927 (1982).

In the instant matter, Employer concedes that Claimant has presented sufficient evidence to invoke the § 20(a) presumption. Employer's Brief at 27. The Claimant testified at trial that she was injured when a door struck her right arm while working for Employer. *Id.* at 24. Claimant's description of her duties as a pipe fitter is not refuted by Employer. Claimant also worked as a stowage person, lifting items overhead and placing them in cabinets. This work also required her to use ladders and work in tight spaces. *Id.* at 24-15. Claimant stated that she left her job with Employer because she was unable to perform her duties any longer. *Id.* at 38-39.

Employer has compensated Claimant for partial disability arising out the June 7, 1996 incident at work. Employer's brief at 28. I find that Claimant has established the causal connection between her disability and her employment. I find that Claimant has established a prima facie case under the Act, and is entitled to the § 20(a) presumption.

Since I have found that Claimant has established entitlement to the § 20(a) presumption by establishing a prima facie case, the burden now shifts to the Employer to rebut the presumption. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989). As previously noted, Employer has conceded Claimant's entitlement to the 20(a) presumption. Employer has submitted no evidence severing the relationship between Claimant's injury and her employment with Employer. All of the Employer's evidence is directed towards refuting Claimant's assertion of total disability. Since Employer's evidence focuses only on the extent of Claimant's injury and not on the relationship between the injury and Claimant's employment, I find that Employer has not successfully rebutted the presumption. I turn now to the question of the nature and extent of her disability.

16. Claimant is permanently disabled.

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. § 902 (10). Therefore, for Claimant to receive a disability award, she must establish both an economic loss and a physical (or psychological) impairment. Sproul v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991).

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968). Generally, a claimant has the burden of proving the nature and extent of his disability. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 60 (1980).

It is undisputed that in June, 1993, a tick bite on Claimant's right neck became infected. Claimant developed an abscess that required surgery, and following surgery, she experienced pain and limitation of motion in her right upper extremity. It is also undisputed that she sustained an injury to her right upper extremity on June 7, 1996, when the door of an ice chest fell on her right arm. Claimant has alleged that she stopped working for Employer because of pain in her shoulder and limitation of motion. The parties have stipulated that Claimant reached maximum medical improvement on September 7, 1996, and neither party has offered medical opinion evidence suggesting that Claimant's upper extremity injury is temporary in nature. I find that the evidence demonstrates that the nature of Claimant's injury from that date, therefore, is permanent. The record reflects that Employer has already compensated Claimant for permanent partial disability from June 15, 2000 to the present and continuing. I find that Claimant has established that her shoulder injury constitutes a permanent disability. However, as

Employer disputes the extent of Claimant's disability, that remains an issue for adjudication herein.

17. Claimant is not totally disabled.

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. 902(10). Therefore, in order for the Claimant to receive a disability award, she must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). The burden of proving the nature and extent of disability rests with the Claimant. See Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

The medical evidence establishes that Claimant has limited, if any function in her right shoulder. She has treated with Dr. Hargus for pain in her right neck and shoulder since June, 1994. Her treatment records document a progression of her pain to date, and since January, 1995, she has taken narcotic pain medication without any significant positive effects on her level of pain. The doctor has diagnosed Claimant with sympathetic reflex dystrophy, and his records refer to autonomic instability that he attributed to being struck on the shoulder with a door in June, 1996. In clinic notes from November 11, 2002, Dr. Hargus stated: "I certainly do not believe she is able to carry on any useful work function. Her pain levels are high. The disability in her arm is quite significant." CX 14 at 3.

In his report of May 4, 1999, Dr. Philo Willetts found that Claimant could use her uninjured arm without restriction, but concluded that her right upper extremity was limited to the degree that it precluded her from overhead lifting, crawling or using ladders. CX 11 at 10. Dr. Willetts determined that Claimant "is substantially disabled. Hypothetically, she could do very sedentary work using her nondominant left hand, but it appears that she is not capable of practically working at the Electric Boat facility." Id. In his most recent report dated April 24, 2003, Dr. Willetts concluded that Claimant was restricted from using her right hand above the shoulder, climbing ladders, crawling, pushing, pulling, and lifting with the right hand. CX 2. He concluded that the combined effect of her work injuries contributed significantly to her condition. Id.

In April, 1998, Dr. Jeffrey Goldblatt concluded that Claimant could perform no activity that involved her right upper extremity. Ex. CX 6. In October, 1998, Dr. Frank Maletz believed that Claimant could not use her right upper extremity. CX 8. Dr. Robert Leffert reached similar conclusions upon his evaluation of Claimant in March, 1999. CX 9.

No countervailing evidence is of record to refute Claimant's description of her duties as either piper fitter or stowage person. Both occupations required her to use her right upper extremity, to lift with her right hand, and to climb and descend ladders. Vocational experts concur that Claimant is unable to perform the duties of her jobs with Employer. EX 1, 3, 6; CX 24. I find that the evidence establishes that Claimant is unable to return to her former work with Employer.

Once the Claimant demonstrates that she is unable to return to her former employment because of a work-related injury or occupational disease, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment that the Claimant is capable of performing considering her age, education, work experience and physical restrictions, and which she could secure if she diligently tried. American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976). A judge may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985).

Claimant's treating physician has concluded that Claimant is totally disabled due to reflex sympathetic dystrophy that he said was caused by her work related injuries. CX-22. Dr. Hargus concluded that she is unable to work at all due to severe pain in her right shoulder. Id. at 23. Although the doctor was unable to specifically attribute the pain to her tick bite and its aftermath or to her being struck with a door, he concluded that her pain and condition worsened after the door incident. Id. at 13, 14. The doctor explained that treatment has not improved her function, but that her pain has been managed through medication. Id. at 27.

Dr. Hargus believed that Claimant's condition had worsened over time, thereby requiring adjustments to her medication. He acknowledged that she experienced no decrease in pain or increase in function despite his treatment. Dr. Hargus agreed that he had referred Claimant to two different surgeons for consultation. He was unable to comment on Dr. Maletz' findings, but disagreed with Dr. Leffert's conclusions. CX 22. Dr. Leffert did not find that Claimant had reflex sympathetic dystrophy, but rather was afflicted with nerve palsy in the trapezius related to her surgery for the abscess in her neck in 1994. CX 9. Dr. Leffert diagnosed secondary thoracic outlet compression, and recommended a splint or pelvic support orthosis. Id. Dr. Hargus rejected the recommendations of other doctors that Claimant might experience improvement by wearing a brace or harness, or through surgery. Dr. Hargus relied upon his credentials as a pain management specialist in concluding that his course of treatment was appropriate.

Dr. Leffert's diagnosis was essentially confirmed by Dr. Maletz, who in October, 1998, found that Claimant had atrophy of the right trapezius and chronic pain syndrome. CX 8. In April, 1998, Dr. Jeffery Goldblatt also discounted reflex sympathetic dystrophy, and diagnosed Claimant with right trapezius palsy that contributed to right upper extremity pain. CX 6. Dr. Willetts diagnosed Claimant with chronic right neck shoulder girdle, upper extremity pain, right trapezius palsy, and probable narcotic dependency.

I find that Dr. Hargus' opinion is not fully consistent with the record or the preponderance of the evidence. Dr. Hargus associated Claimant's increase in pain to her injury with the door, yet Claimant did not seek treatment from him for three weeks after that incident. At that time, Claimant was undergoing regular treatment with Dr. Hargus, and she did not consult with him about that injury until her next regularly scheduled appointment. The record reflects no significant increase in medication or change of treatment by Dr. Hargus before and after June 7, 1996. The doctor did not document how her condition significantly worsened between when he saw her in July, 1996, and when he determined that she could not work in June, 2002. In reaching his conclusion that Ms. Beaudoin is unable to perform any work, Dr. Hargus did not explain how she was able to work full time for seven months after that injury, and

then complete a twelve month course of training and work for two additional years at a different job thereafter. By her admission, Claimant was physically capable of performing the duties of teaching assistant. Tr. at 61. Although I accept Claimant's explanation that she was able to do her stowage job because co-workers helped her, Dr. Hargus did not refer to that as the reason that she was able to work despite her pain and limitations. Dr. Hargus also did not fully address any of the potential negative side effects that an individual taking narcotics might experience and how the medication could affect her performance on a job, other than to mention that she could be sedated. The doctor did not provide a specific explanation of her physical limitations, but reached the conclusion that she was fully disabled.

Although Dr. Hargus' qualifications entitle his opinions to significant weight, his rejection of treatments recommended by other doctors is not fully supportable, in that his records reflect that Claimant experienced ongoing pain despite his treatment protocol, and some of the recommended treatments were not invasive, such as using a harness or brace. Dr. Hargus' opinion regarding the efficacy of alternate treatment is conclusory. The doctor's dismissal of the opinions of surgeons regarding the use of medicinal therapies ignores their training and experience. In sum, I find the doctor's opinions unreasonable and not fully documented. I also decline to accord the doctor more weight because of his status as treating physician. His diagnosis was refuted by all other physicians of record, and his treatment of Claimant was limited to prescribing her pain medication.

In contrast, Dr. Willetts acknowledged that Claimant may be partially disabled due to her June 1996 injury, but the doctor concluded that she is not fully disabled. EX 4 at 6. The physician stated that Claimant is severely disabled with her right extremity, but has full use of her left extremity. Id. The doctor apportioned Claimant's disability as follows:

[Claimant] was left with a significant dysfunction of the right upper extremity long before June 7, 1996. This was chronic, ongoing, and was sufficiently severe to be treated with narcotics ever since 1993. This was the substantial contributor to her condition. Therefore, 20% permanent partial physical impairment of the right upper extremity preexisted June 7, 1996, and if her history be correct, the remaining 4% permanent partial physical impairment of the right upper extremity could fairly be apportioned to the ice chest lid incident of June 7, 1996.

EX 4 at 8.

Dr. Willetts testified that Claimant is able to engage in sedentary work without using her right upper extremity. EX 6 at 14. Dr. Willetts observed that despite the limitations imposed by her impaired upper right extremity, Claimant has full use of her left arm and lower extremities, and is also able to think rationally and communicate well. Id. at 15. The doctor based his opinion on an extensive review of the medical record, physical examination and Claimant's own statements that she engaged in housework, yard work and exercise regularly. Id. at 16. Dr. Willetts concluded that Claimant's condition did not preclude her from all employment.



Dr. Willetts acknowledged that Claimant experienced pain, but testified that the record showed that her pain did not subside despite increased use of narcotic medication. EX 6 at 13. He noted that despite her use of narcotics, she was able to work as a teacher's assistant, and is alert and able to do housework, yardwork, exercise, drive, and take care of children. Id. at 14. The doctor found her daily activities incompatible with an individual who is unable to perform any work at all. Id. He concluded that Claimant is able to perform light sedentary work that does not require the use of her right upper extremity.

I find that Dr. Willetts' opinions are better reasoned and supported by the record as a whole. The doctor's opinions are supported by other physicians of record. Dr. Jeffery Goldblatt evaluated her condition in 1998, and concluded:

...her disability is partial and [] she is capable of performing light duty with no activity of the right upper extremity. She can do some light grasping of the right hand but I don't feel that it is a functional right arm. She has reached maximum medical improvement if she undergoes no surgery. At this time, since it is my impression that we don't know if she is going to undergo surgery it is hard for me to put a permanent partial disability percent on the injury and therefore I will not do it until we have a definite decision as to whether she will go forward with surgery. If she decides not then I think it is reasonable to go forward with a permanent partial disability.

CX 6 at 2.

Although I acknowledge that Dr. Hargus has specialized training in the field of pain management, I note that Dr. Willetts is a highly trained medical professional as well. I find that Dr. Willetts' opinions are entitled to greater weight.

Although the record refers to the evaluation of Claimant's knee, I do not find sufficient evidence to find limitations relating to an impairment of the knee, nor to relate any dysfunction of the knee to the injuries that Claimant sustained while employed with Employer. See, CX 15, 16, 17.

Employer has submitted two vocational assessment reports. EX 1, 3. The August 15, 2003 report, authored by vocational expert Elizabeth Sinatro, was based on the most recent medical reports of Dr. Hargus and Dr. Willetts. Elizabeth Sinatro holds a Masters' degrees in education and rehabilitation counseling and is a certified rehabilitation counselor. EX 6 at 3. The vocational expert concluded that Claimant could work as a front desk clerk and as a cashier. Ms. Sinatro identified four front desk clerk positions and four cashier positions that were available that Claimant would be able to do. The report concluded:

The above information is a sampling of the positions for which Ms. Beaudoin would qualify in her labor market based on transferable skills, educations, and/or entry level position. Ms. Beaudoin's physical restrictions do not limit her from completing these positions based upon

the Independent Medical Evaluation completed by Dr. Willetts on April 24, 2003 and the Dictionary of Occupational Titles. This information clearly demonstrates that there are vocational opportunities, which could return Ms. Beaudoin to gainful employment at wages ranging from \$300 to \$440.00 per week.

EX 1.

Ms. Sinatro relied primarily on Dr. Willetts' report because she found little in Dr. Hargus' reports that addressed Claimant's physical limitations. EX 6 at 7. Ms. Sinatro stated that she personally visited and evaluated employment opportunities at the Hilltop Inn, Best Western, Foxwoods Casino and Wal-Mart. Id. at 12. Ms. Sinatro also spoke to several employers via telephone asking them about the requirements of the jobs in consideration of Claimant's physical limitations. EX 6 at 8. Ms. Sinatro's vocational report and subsequent deposition indicate that the report is based on a thorough understanding of the Claimant's limitations, age, work history and education. Ms. Sinatro's report and deposition adequately addressed how the Claimant's medical restrictions are compatible with jobs cited in the report. Ms. Sinatro testified that she did not factor pain into the analysis of Claimant's ability to work. Id. at 12. She also did not consider how an individual's drowsiness or confusion might affect performing the jobs of desk clerk or cashier. Id. at 13, 14. These limitations were not set forth by Dr. Willetts. Id.

I accord significant weight to Ms. Sinatro's opinion regarding the availability of work that Claimant could perform. Although she did not consider how drowsiness or confusion could affect Claimant, the record does not clearly establish that Claimant experienced such symptoms. The record unequivocally establishes that Claimant has pain, but the evidence does not support finding that the pain is totally debilitating. Claimant has been treated for pain since her surgery in 1994, and experienced an increase in her pain after her June, 1996 injury. However, she was able to work full time for months after that surgery. She then successfully completed a twelve month program of training as a medical assistant. Following that, she successfully worked as a teacher's aide for two years, including summer. Although she testified that in 2002, she was advised by Dr. Hargus that she should stop working, there is little in the medical record that establishes a significant worsening in her condition at that time that would support his recommendation. Moreover, the record indicates that Dr. Hargus never encouraged her to continue working at any time. She is able to perform activities of daily living that involve concentration and coordination, such as ironing and exercising. Tr. at 52-54.

Claimant relies on the medical opinion of Dr. Hargus and the vocational assessment report and deposition of Cherie King. Ms. King is board certified as a vocational expert and is also a rehabilitation counselor. CX 24 at 4-5. Ms. King concluded that Claimant was incapable of engaging in competitive employment.

I find Ms. King's opinion inconsistent with the evidence. Ms. King did state that she has been able to place individuals with severe upper extremity impairment in employment positions. Id. at 16. Further, she stated on cross examination that Claimant would be able to be retrained in another field. Id. at 21. Ms. King depended upon Claimant's self-reported limitations in

concluding that she could not work. Ms. King's opinion is further contradicted by Claimant's work history as a teacher's aid and training as a medical assistant that included a two month internship. Tr. at 60. The record also reflects that Claimant was offered a position as medical assistant that she refused because she was waiting for the resolution of her insurance case. Tr. at 62. Claimant worked as a teacher's aide both full time and part time, and drove herself to and from that job each day. Id. at 59.

I appreciate that Claimant experiences pain, but she successfully completed the criteria of a training program and worked as a teacher's aid despite the effects of pain and any effects of her pain medication. Ms. King did not explain the conflict between her opinion that Claimant is unemployable, and the fact that she performed significant work for years after her injury. Nor did Ms. King address Claimant's ability to successfully complete a training program that lasted for twelve months despite her subjective symptoms. The expert admitted that she did not conduct tests to determine Ms. Beaudoin's aptitude for retraining. Ms. King relied upon Dr. Hargus' opinion, which itself was in conflict with the fact of Claimant's working. She continued in treatment with the doctor while she was employed. Tr. at 64. Ms. King's assessment is based upon subjective criteria and is not well reasoned or well supported by the record. I accord it little weight.

Employer also submitted the vocational assessment of Kent S. Moshier dated May 25, 2000. EX 3. The report found five hostess positions, five cashier positions, two counter clerk positions and seven reservation agent positions available for Claimant. EX 3. While the report does report the availability of positions, and is based on medicals reports of Dr. Hargus, Dr. Leffert and Dr. Willetts, I find that the report is entitled to less weight. Employer has not submitted any evidence regarding the qualifications or educational background of Mr. Moshier. Further, Employer has not submitted any written or deposition testimonial evidence regarding him. While the lack of information regarding the author of the report does not invalidate its findings all together, I find that the report is entitled to less weight, particularly with respect to jobs that Claimant could currently perform. Mr. Moshier did not have the opportunity to review the most recent medical assessments of record, and accordingly, his opinion is not well-documented.

In consideration of the above stated evidence, I find that Employer has met its burden of showing available suitable alternative employment.

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove he conducted a diligent job search and demonstrated a willingness to work. See Williams v. Halter Marine Serve., 19 BRBS 248, 253 (1987). If the claimant does not prove such her disability is partial at the most, and not total. See Southern v. Farmers Export Co., 17 BRBS 64, 65 (1985).

Claimant has provided testimony that she enrolled and in and successfully completed a medical training program. Further, she testified that for a period of approximately two years after leaving Employer she worked as a teacher's aide in the North Stonington School District. While this indicates a willingness to work in a general sense, neither medical assistant nor teacher's assistant were among the suitable occupations determined by Employer's vocational

experts. Claimant's responsibilities as a teacher's assistant were significantly different than the positions submitted by Employer. There is no evidence, other than Claimant's assertion that she cannot do other work, that she could not perform work. I place little weight on Dr. Hargus' recommendation that she not work, as the record reflects that he never encouraged her to attempt work, and indeed, encouraged her not to return. Tr. at 64. In addition, Claimant demonstrated the ability to engage in a training program, and then, later, to work as a teacher's assistant, despite Dr. Hargus' recommendation.

Claimant must establish reasonable diligence in attempting to secure some type of suitable alternative employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. New Orleans Gulfwide Stevedores v. Turner, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5<sup>th</sup> Cir. 1981), 14 BRBS 156, 165 (1981). There is no evidence of record that indicates that Claimant diligently sought employment in cashier or front desk clerk positions. Accordingly, I find that Claimant has not established reasonable diligence and willingness to work in the employment opportunities proposed by Employer. Since Claimant has failed to rebut Employer's showing of suitable alternative employment, I find that Claimant is not totally disabled.

#### IV. Employer is not entitled to Section 8(f) relief.

On April 25, 2003, Employer submitted an application for Special Fund relief under section 8(f) of the Act. Section 8(f) of the Act limits, in certain instances, the liability of an employer for disability payments under the Act. 33 U.S.C. § 908(f)(1). "By so limiting an employer's liability, Congress wished to facilitate and encourage the hiring of partially disabled people." Todd Pac. Shipyards v. Director, OWCP, 913 F.2d 1426, 1429 (9th Cir.1990); see also Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1553 n. 2 (9th Cir.1991) (concurring opinion). Congress sought to ensure that employers would not hesitate to hire a partially disabled person out of fear of increasing their liability in the event that a work-related injury, combined with a preexisting partial disability, resulted in a total disability. Todd Pac. Shipyards, 913 F.2d at 1429. To qualify for section 8(f) relief, an employer must show (1) that the claimant had a pre-existing partial disability, (2) that this partial disability was manifest to the employer, and (3) that it rendered the second injury more serious than it otherwise would have been. Director, OWCP v. Berkstresser, 921 F.2d 306, 309 (D.C. Cir. 1990).

Included in Employer's application are the medical reports and notes of Dr. Willetts from March 28, 2000 and Dr. Hargus from June 24, 2002 through December 17, 2002. Employer alleges that the "pre-existing injury or condition, which forms the basis of this application, is the claimant's chronic pain syndrome and her head and neck injuries following a severe reaction to a tick bite in 1994." Employer's 8(f) Application at 2. Claimant indicated that she sustained a tick bite at work while cleaning up after a fire. Tr. 29-30. Claimant's assertion is corroborated by the medical opinion report of Dr. Leffert. Dr. Leffert's March 17, 1999 report stated that Claimant "has a complete spinal accessory nerve palsy which appears to be connected with her incision and drainage for an abscess produced by a tick bite while at work in 1994." CX 9 at 2. Implicitly, the pre-existing injury contemplated under section 8(f) is an injury that occurs outside of the parameters of and is not related to, the workplace. An employer faces greater liability when it hires or retains a worker with prior impairment since a work injury may result in

substantially great disability than a healthy worker would have suffered. C & P Telephone Co. v. Director, OWCP, 564 F.2d 503, 512 (D.C. Cir. 1977). As previously stated, section 8(f) was enacted to avoid discrimination in the hiring of disabled workers. Since Claimant sustained her tick bite and subsequent surgery while performing her duties for Employer, she cannot be said to have had a pre-existing condition or injury that qualifies under this section of the Act. Accordingly, Employer's application for Special Fund Relief under section 8(f) of the Act must be denied.

V. Determination of Compensation Rate

Section 8(c)(21) of the Act holds:

In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability.

§ 8(c)(21).

Where the claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. See Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984). Claimant's current wage earning capacity is based on the vocational assessment and deposition of Elizabeth Sinatro. (EX 1, EX 6). Based on the wages reported by the responding employers for cashier and front desk clerk positions at an hourly rate of \$7.50 - \$11.00 per hour, Claimant has a current weekly earning potential of \$440. EX 1. In 1996, Claimant would have earned \$5.50 - \$8.00 per hour, with a weekly earning potential of \$320. The parties have stipulated that Claimant average weekly wage is \$754.71. Claimant therefore is entitled to compensation at the rate of \$289.81 per week. (2/3 of \$754.71 (-) \$320)

ORDER

It is ORDERED that:

1. Claimant's claim for total disability is denied and dismissed.
2. Employer shall pay Claimant Shirley A. Beaudoin permanent partial disability benefits in the amount of \$289.81 per week from the date of maximum medical improvement, September 7, 1996, to the present and continuing.
3. Employer shall receive credit for compensation already paid to Claimant.

4. Claimant's counsel may file and serve a fee and cost petition in compliance with 20 C.F.R. § 702.132. She shall first attempt to reach an agreement with opposing counsel regarding fees and costs, and set forth the extent of those discussions in her petition.

A

Janice K. Bullard  
Administrative Law Judge

Cherry Hill, New Jersey